UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KIM M. YORK, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Civil No. 03-99-P-H***
	)	
TOWN OF LIMINGTON, MAINE,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON MOTION TO SUBSTITUTE REVISED PROPOSED AMENDED COMPLAINT AND RECOMMENDED DECISION ON MOTION TO AMEND COMPLAINT

On September 30, 2003 plaintiffs Kim M. York, Michael D. York, Sr. (both, "Yorks") and Burning Rose Land Development, LLC ("Burning Rose") (collectively, "Plaintiffs") moved pursuant to Federal Rule of Civil Procedure 15(a) for leave to file a first amended complaint. *See* Motion for Leave To File First Amended Complaint ("Motion To Amend") (Docket No. 16). On November 3, 2003, they moved to substitute a revised proposed first amended complaint or, in the alternative, to file a second amended complaint. *See* Motion for Leave To Substitute a Revised First Amended Complaint, or (in the Alternative) for Leave To File a Second Amended Complaint ("Motion To Substitute") (Docket No. 21); [Proposed] First Amended Complaint for Declaratory and Injunctive Relief (Revised) ("Revised Proposed Amended Complaint"), attached thereto. I grant the Motion To Substitute insofar as it seeks substitution of the Revised Proposed Amended Complaint for the earlier preferred version, and recommend for the

reasons that follow that the Motion To Amend (as it pertains to the Revised Proposed Amended Complaint) be denied and that the court *sua sponte* dismiss such of the Plaintiffs' original claims as survived an earlier motion to dismiss.

I. Applicable Legal Standards

Pursuant to Rule 15(a) a party must seek leave of the court to amend a pleading if either the deadline to amend has expired or the party already has amended its pleading once within the time allotted by the rule. Such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend should be granted in the absence of reasons "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In the instant case, the defendant Town of Limington, Maine ("Town") objects to the Revised Proposed Amended Complaint on the ground of futility. *See* Defendant's Objection to Plaintiffs' Motion To File First Amended Complaint ("Amendment Objection") (Docket No. 18) at 1-3, 7; Defendant's Objection to Plaintiffs' Motion for Leave To Substitute a Revised First Amended Complaint, or (in the Alternative) for Leave To File a Second Amended Complaint ("Substitution Objection") (Docket No. 24) at 1-2, 7-8. "In reviewing for 'futility,' the district court applies the same standard of legal sufficiency as applies to a Rule 12(b)(6) motion." *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996) (noting that futility "means that the complaint, as amended, would fail to state a claim upon which relief could be granted."). Rule 12(b)(6) standards, in turn, are as follows:

"In ruling on a motion to dismiss [pursuant to Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs."

Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001). The defendants are entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

Ordinarily, in weighing a Rule 12(b)(6) motion, "a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." *Alternative Energy*, 267 F.3d at 33. "There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Id.* (citation and internal quotation marks omitted); *see also, e.g., Young v. Lepone*, 305 F.3d 1, 11 (1st Cir. 2002) ("When the factual allegations of a complaint revolve around a document whose authenticity is unchallenged, that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)."") (citations and internal quotation marks omitted).

II. Factual Context

For purposes of the Motion To Amend I accept the following well-pleaded facts of the Revised Proposed Amended Complaint as true:

The Yorks, husband and wife, are residents of the Town. Revised Proposed Amended Complaint ¶ 1. Burning Rose is a Maine limited liability company whose members are Michael York, Sr., 51 percent, Kim York, 39 percent, and Michael York, Jr., 10 percent, and whose principal place of business is in the Town of Standish, Cumberland County, Maine. *Id.* ¶ 2.

The Plaintiffs own numerous properties in the Town, including building lots within residential subdivisions. *Id.* ¶ 5. The Plaintiffs are real estate developers, construction contractors and landlords with

respect to various properties in the Town and are in the business of building homes for sale or rental to the public and selling land to other contractors after site preparation. *Id.* ¶ 6. Nearly all of the persons buying homes built and sold or rented out by the Plaintiffs in the Town are non-residents prior to their purchase or lease of homes from the Plaintiffs. *Id.* ¶ 7.

The Town adopted a growth-management ordinance ("Ordinance") in or about March 1997, together with a comprehensive plan ("Comprehensive Plan"). *Id.* ¶ 8. These limited the number of growth-management permits ("Permit" or "Permits") that could be issued in any year to thirty-five and made issuance of a Permit a condition precedent to obtaining any new residential building permit. *Id.*

In or about March 2003, on recommendation of its Growth Management Committee and Planning Board, the Town amended its Ordinance ("2003 Amendment"). *Id.* ¶ 9. Under the 2003 Amendment, no person can apply for or obtain a Permit if the applicant possesses two "unused" Permits or has had four Permits issued within the same year. *Id.* ¶ 10. The 2003 Amendment applies these limitations to Permits held by another person or persons who are within specified classes of familial relationship to the applicant, regardless of other circumstances. *Id.* Although the 2003 Amendment further provides for the denial of any application or issuance of Permits "when, in the discretion of the Code Enforcement Officer, the failure to deem the person or entity to be an applicant would circumvent the purposes of this ordinance" (the "CEO Discretion Provision"), the 2003 Amendment does not provide any authorization to issue Permits when there are other circumstances that would make inclusion of a person or persons within the specified classes of familial relationship unfair. *Id.*

The stated purpose of the 2003 Amendment was to ensure fairness in the allocation of Permits. *Id.* ¶ 11. However, the limitations on the issuance of Permits were designed to ensure that sufficient Permits would be available to current residents of the Town without regard to the impact upon the availability of

housing to non-residents who would purchase or occupy homes built for them by contractors. *Id*. The effect of the 2003 Amendment is to reduce the number of Permits available to the Plaintiffs and other contractors who build homes for lease or sale to the public generally, when nearly all such tenants and/or purchasers are not residents of the Town at the time of rental or purchase. *Id*. ¶ 12. The effect of the 2003 Amendment as applied is to diminish the amount of new housing that can be built within the Town that is available to non-residents. *Id*. ¶ 13.

The father of Michael York, Sr., had twenty-one children, many of whom are in the construction business in southern Maine. *Id*. ¶ 15. Kim York (formerly Kim M. Douglass) also has several relatives within the proscribed family relationships who are in the construction business in southern Maine. *Id*. Several persons to whom the Plaintiffs frequently sell building lots are building contractors related to them in the manner specified in the 2003 Amendment. *Id*. ¶ 16. Those persons then build homes for sale or lease to the general public. *Id*.

Most of the persons related to the Plaintiffs in the manner specified in the 2003 Amendment do no business whatsoever with them. *Id*. ¶ 17. The application for, or possession of Permits by, any of the persons related to the Plaintiffs in the manner specified in the 2003 Amendment adversely affects the Plaintiffs' ability to obtain Permits. *Id*. ¶ 18.

The limitations in the 2003 Amendment were modeled upon those contained in the Town of Waterboro's growth-management ordinance ("Waterboro Ordinance"), which was reviewed by the Town's Growth Management Committee. *Id*. ¶ 19. The Waterboro Ordinance's limitations on permits by reason of specified familial relationships are subject to rebuttal by the applicant. *Id*. ¶ 20. Those limitations are not subject to rebuttal in the 2003 Amendment. *Id*. ¶ 21. Pursuant to the Waterboro Ordinance, the limits on the number of growth-management permits that can be held are computed on a subdivision basis.

Id. ¶ 22. Pursuant to the 2003 Amendment, the number of Permits that can be applied for, issued or held at any time are computed on a town-wide basis. *Id*. ¶ 23.

On April 22, 2003 Kim York applied for a Permit so that she could build a new single-family home on property owned by her at Map R-5 (portion of Lot 10A) for use as her residence. *Id*. ¶ 24. The Code Enforcement Officer ("CEO") denied her application on the basis that the Yorks' son, Michael York, Jr., then possessed two unused Permits. *Id*. ¶ 25. Kim York cannot even get her name on the waiting list by applying for a Permit to be issued in a subsequent year so long as any person (or persons in the aggregate) related to her in the manner specified in the 2003 Amendment possesses two unused Permits or has possessed four Permits within the year in which she applies. *Id*. ¶ 26.

Burning Rose was established in 1991 and is the owner of property at Limington Tax Assessor's Map 9, Lot 13. *Id*. ¶ 27. On April 22, 2002 Burning Rose applied for a Permit to develop the property owned by it, but the Permit was denied on the basis that Michael York, Jr., owned a ten percent share of Burning Rose and held two Permits. *Id*. ¶ 28. Burning Rose will be unable to get on the waiting list for a Permit so long as Michael York, Jr., the Plaintiffs or any aggregation of their relatives by blood or marriage possesses two unused Permits or has had four Permits within the year. *Id*. ¶ 29.

The 2003 Amendment reduced the number of homes that will be built by the Plaintiffs and other contractors for sale or lease to their customers, who are usually non-residents of the Town. *Id*. ¶ 32.

After January 1, 2003 all provisions of the Ordinance are expressly required by 30-A M.R.S.A. § 4314 to be consistent with a comprehensive plan adopted under Title 30-A, chapter 187, subchapter II. *Id*. ¶ 48. The Comprehensive Plan was adopted by the Town in 1997 and has not been amended. *Id*. ¶ 49. The only growth-management implementation actions authorized by the Comprehensive Plan are actions to "[a]mend the growth ordinance to maintain a reasonable rate of growth" and to "[a]mend the

growth ordinance so that subdividers know upon receipt of subdivision approval how many homes can be built in that subdivision each year according to the growth cap as applied to all developments." *Id*. ¶ 50.

III. Analysis

A. Federal Claims: Proposed Counts I-III

The Plaintiffs assert in Count I of the Revised Proposed Amended Complaint that the 2003 Amendment "is unfair both on its face and in its application to the Plaintiffs and those to whom they would rent or sell homes," violating the due-process clause of the Fourteenth Amendment to the United States Constitution (i) as applied to them, (ii) as applied to their potential tenants and customers and (iii) as applied to potential tenants and owners of lots to be sold to other contractors who purchase land from the Plaintiffs to construct homes for sale or lease to the public. *Id*. ¶¶ 31, 33.

The Plaintiffs allege in Count II that the 2003 Amendment's scheme of classification by familial relationship (i) violates their rights under the equal-protection clause of the Fourteenth Amendment to the United States Constitution, both on its face and as applied to them, and (ii) violates the equal-protection rights of potential purchasers and tenants of their properties to freely migrate to the Town, as applied to those persons. *Id*. ¶¶ 35-36. They also allege in Count II that the overall town-wide limitation on the number of Permits that can be applied for or issued to any person under the 2003 Amendment violates their equal-protection rights and those of potential purchasers and tenants of their property, as applied. *Id*. ¶ 37. Count III alleges violation of 42 U.S.C. § 1983. *Id*. ¶¶ 38-40.

The Town argues that proposed Counts I and II are futile inasmuch as (i) to the extent they allege harm to the Plaintiffs, they merely rehash claims set forth in the original complaint that the court has dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim as to which relief

can be granted, and (ii) to the extent they allege harm to third parties, they likewise fail to state a claim for relief and, in any event, the Plaintiffs lack standing to press those third-party claims. *See* Substitution Objection at 2-7. I agree.

To the extent proposed Counts I and II implicate the Plaintiffs' rights, they echo the allegations of the now-dismissed Counts II and III of the original complaint, which targeted the familial-relationship rules of the 2003 Amendment. *Compare* Complaint for Declaratory and Injunctive Relief ("Original Complaint") (Docket No. 1) ¶¶ 25-35 *with* Revised Proposed Amended Complaint ¶¶ 5-37; *see* Recommended Decision on Defendant's Motion To Dismiss ("Recommended Decision") (Docket No. 17) at 11-19; Order Affirming Recommended Decision of the Magistrate Judge (Docket No. 25).[1]

While the Revised Proposed Amended Complaint contains new allegations buttressing the Plaintiffs' right-to-travel assertions, it does not allege (nor is it fairly inferable from its allegations) that the Plaintiffs belong to a suspect class or that one of their fundamental rights is infringed. *See generally* Revised Proposed Amended Complaint. Thus, with respect to their personal claims, the rational-basis standard of review applies. *See, e.g., Igartua de la Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994) (citing caselaw in equal-protection and due-process contexts for proposition that if "a distinction neither affects a suspect class nor infringes a fundamental right, it need only have a rational basis to pass constitutional muster") (footnote omitted).

In the context of the motion to dismiss, the Town preferred a justification for the 2003 Amendment – fairness of Permit allocation among families – that the court found to be a legitimate goal, rationally related to and furthered by the mechanics of the 2003 Amendment. *See* Recommended Decision at 11-13. The

[1] Inasmuch as the Original Complaint contained two Count IIIs, I referred to the first as "Count III" and the second as (*continued on next page*)

Plaintiffs' new assertion that the Town improperly enacted the 2003 Amendment to benefit existing residents does nothing to undermine the force of the court's prior decision inasmuch as, in the context of rational-basis review, a governmental entity need only articulate "some reasonably conceivable set of facts that could establish a rational relationship between the challenged [ordinance] and the government's legitimate ends." *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003) (citation and internal quotation marks omitted).[2] Thus, as regards the Plaintiffs' rights, proposed Counts I and II are futile.

Beyond this, the Plaintiffs seek for the first time, via the Revised Proposed Amended Complaint, to represent *jus tertii* the due-process and equal-protection rights of persons doing business with them who wish to migrate to the Town. *See* Plaintiffs' Response to Defendant's Objection to Plaintiffs' Motion for Leave To File First Amended Complaint ("Amendment Reply") (Docket No. 20) at 1-2. As the Town suggests, see Substitution Objection at 6-7, they lack standing to do so.[3]

The First Circuit has described the presentation of *jus tertii*, or third-party, rights as disfavored "based on two important considerations":

> First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not.
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> ***
>
> [Second], third parties themselves usually will be the best proponents of their own rights.

"Count III(B)." *See* Recommended Decision at 7 n.1. I continue to do so in this opinion.

[2] What is more, for purposes of rational-basis review, a governmental entity's preferred facts "need not be supported by an exquisite evidentiary record. Indeed, they need not be supported by any evidentiary record at all." *Rowe*, 320 F.3d at 47 (citations and internal quotation marks omitted).

[3] A challenge to a plaintiff's *jus tertii* standing does not implicate the court's subject-matter jurisdiction. *See, e.g., Craig v. Boren*, 429 U.S. 190, 193 (1976) ("[O]ur decisions have settled that limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary rule of self-restraint designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative.") (citations and internal quotation marks omitted).

Friedman v. Harold, 638 F.2d 262, 265-66 (1st Cir. 1981) (citations and internal quotation marks omitted). Consistent with these concerns,

> [t]he Supreme Court has articulated three prudential considerations to be weighed when determining whether an individual may assert the rights of others: (1) the litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute, (2) the litigant must have a close relation to the third party, and (3) there must exist some hindrance to the third party's ability to protect his or her own interests.

Lepelletier v. FDIC, 164 F.3d 37, 43 (D.C. Cir. 1999) (citations and internal punctuation omitted). With respect to the third criterion, the Plaintiffs posit that "[i]t is obvious that practical obstacles preclude *potential Limington immigrants* (possible customers of Plaintiffs and the contractors purchasing from them) from vindicating their right to obtain homes in the Town of Limington, where *potential* immigrants are unidentifiable." Plaintiff's [sic] Response to Defendant's Objection to Motion for Leave To File a Revised First Amended Complaint, or (in the Alternative) To File a Second Amended Complaint ("Substitution Reply") (Docket No. 27) at 6 (emphasis in original).

I am unpersuaded. Assuming the truth of the facts as alleged in the Revised Proposed Amended Complaint, the Plaintiffs themselves would be in a position to identify non-resident customers who desire to buy or rent homes in the Town but are impeded from doing so by virtue of the impact of the 2003 Amendment on the Plaintiffs and/or contractors with whom the Plaintiffs do business. No reason appears why such customers could not protect their own interests, to the extent they adjudge them sufficiently harmed to warrant litigation. An insufficient showing is made to justify *jus tertii* standing. *See, e.g., R.S.S.W., Inc. v. City of Keego Harbor*, 56 F. Supp.2d 798, 806 (E.D. Mich. 1999) (for purposes of *jus tertii* analysis, "[c]ourts have required either that the allegedly injured third-party be subject to some

genuine obstacle to asserting his or her own rights or that such assertion be in all practical terms impossible") (citation and internal quotation marks omitted).

Such cases as I have been able to find that are closely on point reach the same result. For example, in *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), the Court of Appeals for the Ninth Circuit held that a construction-industry association and two landowners lacked standing to assert that the growth-management plan of the City of Petaluma, California, unconstitutionally infringed third parties' fundamental right to travel, reasoning, *inter alia*:

> The primary federal claim upon which this suit is based[,] the right to travel or migrate[,] is a claim asserted not on the appellees' own behalf, but on behalf of a group of unknown third parties allegedly excluded from living in Petaluma. Although individual builders, the Association, and the Landowners are admittedly adversely affected by the Petaluma Plan, their economic interests are undisputedly outside the zone of interest to be protected by any purported constitutional right to travel. Accordingly, appellees' right to travel claim falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.
>
> There are several exceptions to this general rule, but plaintiffs do not fall within any of them. . . . Assuming [a]rguendo that the constitutional right to travel applies to this case, those individuals whose mobility is impaired may bring suit on their own behalf and on behalf of those similarly situated. Although *Warth v. Seldin*[, 422 U.S. 490 (1975),] denied standing to a group of low-income and minority-group plaintiffs challenging exclusionary zoning practices, the case is no bar to a suit against the City brought by a proper group of plaintiffs. The Court in *Warth v. Seldin* left open the federal court doors for plaintiffs who have some interest in a particular housing project and who, but for the restrictive zoning ordinances, would be able to reside in the community.

Id. at 903-05. In at least two other cases, in like fashion district courts rejected developers' bids to champion the travel or migration rights of potential customers. *See Wincamp P'ship v. Anne Arundel County*, 458 F. Supp. 1009, 1025 (D. Md. 1978) (citing *City of Petaluma* for proposition that plaintiff land developers lacked standing to raise right to travel of third parties of present or future generations); *Rasmussen v. City of Lake Forest*, 404 F. Supp. 148, 157-58 (N.D. Ill. 1975) (holding that plaintiff real-

estate developers did not have standing to raise travel rights of persons who might move into their real-estate development if challenged zoning ordinance and practices were found unconstitutional; noting, *inter alia*, that "plaintiffs have given no cogent reason why prospective residents cannot, logistically, bring right to travel claims themselves").

The weight of the caselaw, combined with the weakness of the Plaintiffs' showing of the existence of an obstacle to potential residents' ability to represent themselves, counsels in favor of denial of *jus tertii* standing.

In any event, even assuming *arguendo* that it is appropriate to accord *jus tertii* standing to the Plaintiffs in this case, the Revised Proposed Amended Complaint fails to state a claim in that it is devoid of well-pleaded facts showing a violation rising to constitutional magnitude. As the Supreme Court has observed: "A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903-04 (1986) (citations and internal quotation marks omitted). One can only reasonably conclude, based on the allegations of the Revised Proposed Amended Complaint and the language of the 2003 Amendment (which is integral to the complaint and thus cognizable by Rule 12(b)(6) standards), that the ordinance fits none of these three categories.

The Revised Proposed Amended Complaint contains no allegation that the 2003 Amendment actually has deterred anyone from migrating to the Town. Nor does it allege that the primary objective of the 2003 Amendment is to impede such travel or migration; rather, it alleges that the 2003 Amendment aims to "ensure that sufficient Permits will be available to present residents of the Town, without regard to their impact upon the availability of housing to persons who are not then residents of the Town who would purchase or occupy homes built for them by contractors." Revised Proposed Amended Complaint ¶ 11.

Nor, finally, does the proposed complaint allege a burden on migration sufficient to amount to a "penalty" as that concept has been elucidated in the caselaw. The 2003 Amendment, which does not on its face ban or direct reduction in sale or lease of new housing to non-residents and does not impact sale or lease of existing housing, is sharply distinguishable from legislation that has been held to impose a penalty, such as durational residency requirements that flatly deny eligibility for vital benefits or reduce the quantum of benefits available until a person has resided in a state for a certain period of time. *Compare, e.g., Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 251, 261-62 (1974) (durational-residency requirement denying right to free non-emergency medical care to newly arrived residents such as plaintiff "penalizes indigents for exercising their right to migrate to and settle in that State."); *Maldonado v. Houstoun*, 157 F.3d 179, 188 (3d Cir. 1998) ($532 monthly reduction in plaintiffs' Pennsylvania benefits based solely on their newly arrived status "plainly penalizes them for having exercised their right to migrate into the state."). In this case, there is no allegation of across-the-board denial or reduction in benefits to would-be migrants. Rather, the allegation is that the 2003 Amendment is crafted in such a manner as to favor residents, shrinking the pool of new housing available to non-residents. Even granting that such an ordinance discourages migration, it does not penalize it in a constitutional sense. *See, e.g., Michael C. ex rel. Stephen C. v. Radnor Tp. School Dist.*, 202 F.3d 642, 655 (3d Cir. 2000). ("[A]n otherwise constitutional law that incidentally discourages migration is not necessarily rendered suspect or invalid merely because of such incidental effect."); *Smith v. Lower Merion Township*, Civ. A. No. 90-7501, 1991 WL 152982, at *6-*7 (E.D. Pa. 1991) (declining to impose heightened scrutiny with respect to students' right-to-travel challenge to zoning restricting ability of residential homeowners to rent to college and university students; observing, "Without understating the substantial impact the Ordinance may have on students' ability to find suitable housing, I am unable to find that a zoning ordinance creates a barrier to interstate

migration merely by limiting options and increasing costs for persons wishing to reside in a particular locality.").

For these reasons, proposed Counts I and II fail to state a claim as to which relief can be granted. Accordingly, they are futile. The parties agree that proposed Count III, a section 1983 claim, is derivative of proposed Counts I and II and rises or falls on those claims. *See* Amendment Objection at 2; Amendment Reply at 6; *see also, e.g., Cruz-Erazo v. Rivera-Montañez*, 212 F3d 617, 621 (1st Cir. 2000) ("As is well established, § 1983 creates no independent substantive rights, but rather provides a cause of action by which individuals may seek money damages for governmental violations of rights protected by federal law."). Proposed Count III therefore also fails to state a claim as to which relief can be granted, as a result of which it, too, is futile.

B. State Claims: Proposed Counts IV-VI

The Plaintiffs' remaining three proposed counts assert state-law claims, specifically:

1. Count IV: that the grant by the 2003 Amendment of unfettered discretion to the CEO to deny Permits violates the separation-of-powers clause of the Maine Constitution. Revised Proposed Amended Complaint ¶¶ 41-43.

2. Count V: that the 2003 Amendment is not reasonably necessary for the accomplishment of any real or legitimate purposes in the exercise of the police power and constitutes an unnecessary and oppressive restriction in violation of the due-process and equal-protection guaranties of the Maine Constitution, art. 4, pt. 3, § 1 and/or art. 1, § 1. *Id*. ¶¶ 44-46.

3. Count VI: that the 2003 Amendment is inconsistent with the Comprehensive Plan and therefore invalid under 30-A M.R.S.A. § 4314. *Id*. ¶¶ 47-52.

As a threshold matter, the Town posits that the three state-law counts are futile in the absence of proposed Counts I-III inasmuch as they would not survive a motion to dismiss for lack of federal jurisdiction. *See* Amendment Objection at 2-3. Technically, the issue the Town raises is one of discretionary refusal to exercise, rather than lack of, supplemental jurisdiction. *See, e.g., Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1176-77 (1st Cir. 1995) (district court "plainly possessed the raw power to exercise supplemental jurisdiction" over state-law claim arising out of same nucleus of facts as federal Title VII claim; however, "[a]s a general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims."). The Plaintiffs essentially concede the Town's point as to proposed Counts IV and V but argue that a declination of supplemental jurisdiction over proposed Count VI could have the effect of causing this court to render an advisory and unnecessary decision on the merits of their federal equal-protection and due-process claims if they succeed in an inevitable proceeding in state court on the merits of proposed Count VI. *See* Amendment Reply at 6.

This logic is difficult to follow. The Town's supplemental-jurisdiction argument presupposes a finding that proposed Counts I through III are futile. In that event, any attempt by the Plaintiffs to resurrect those federal claims in this court following a state-court proceeding would be vulnerable to dismissal for failure to state a claim pursuant to Rule 12(b)(6) and arguably on *res judicata*/claim-splitting grounds. *See, e.g., Wong v. Smith*, 961 F.2d 1018, 1021 (1st Cir. 1992) (*res judicata* "an indication of natural aversion of the court to protracted litigation and multiplicity of action, and of policy that neither public nor parties should have to bear burden and expense of two lawsuits where only one is necessary") (citation and internal quotation marks omitted). In short, the Plaintiffs offer no compelling reason to believe that in the context of a Rule 12(b)(6) motion to dismiss, this court would deviate from its customary practice of declining to

exercise supplemental jurisdiction over state-law claims when foundational federal claims are dismissed at such an early stage in the proceedings. Thus, with respect to the four corners of the Revised Proposed Amended Complaint itself, proposed Counts IV-VI are futile. Upon dismissing proposed Counts I-III for failure to state a claim, the court would decline to exercise its supplemental jurisdiction over the remaining state-law claims.

Beyond this – and although this point is not raised by the parties – I have considered whether the fact that an ostensible federal claim survived the Town's motion to dismiss alters the equation. I conclude that it has now become clear that the surviving claim, a portion of original Count III(B), itself should be dismissed. As a result, that claim could not justify retention of supplemental jurisdiction over proposed Counts IV-VI.[4]

In Count III(B) of the Original Complaint the Plaintiffs targeted the CEO Discretion Provision, alleging that the Ordinance vested unreviewable power in the CEO in violation of the separation-of-powers provisions of the Maine Constitution and the due-process clause of the Fourteenth Amendment to the United States Constitution. *See* Original Complaint ¶¶ 36-38. The Town argued persuasively, and the court accepted, that decisions made by the CEO pursuant to the CEO Discretion Provision are in fact reviewable, as a result of which that portion of Count III(B) was dismissed. *See* Recommended Decision at 19-21. Nonetheless, in opposing the Town's motion to dismiss, the Plaintiffs clarified that there was a second predicate to Count III(B): the asserted vagueness of the standard pursuant to which the CEO was to exercise his or her discretion. *See* Plaintiffs' Opposition to Defendant's Motion To Dismiss (Docket No. 8) at 11. I understood the Plaintiffs to have characterized this claim as implicating both state and federal

[4] Count V of the Original Complaint, which asserted a claim pursuant to 42 U.S.C. § 1983, also survived the motion to (*continued on next page*)

constitutional protections, *see id*., consistent with the relevant allegations of the Original Complaint. Solely on the basis that the Town failed to respond in its reply brief to the vagueness argument, that claim survived dismissal. *See* Recommended Decision at 21.

Now, in the context of moving to amend their complaint, the Plaintiffs implicitly clarify that their claim targeting the CEO Discretion Provision is purely state-law-based. *See* Revised Proposed Amended Complaint ¶¶ 41-43; Amendment Reply at 7 (asserting that "no substantive amendment" was proposed with respect to Plaintiffs' CEO Discretion Provision challenge). Hence, that claim cannot serve as a foundational federal claim for proposed Counts IV-VI. Further, had that claim been clearly characterized as a state-law claim during briefing of the motion to dismiss, it surely would have been dismissed then in the exercise of the court's discretion not to retain supplemental jurisdiction over any remaining standalone state-law claims.

In any event, Count III(B) of the Original Complaint is non-viable for yet another reason: As the Town argues in the context of the instant motions, the Plaintiffs lack standing to press claims implicating the CEO Discretion Provision. *See* Amendment Objection at 3-4.[5] "The standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Cotter v. City of Boston*, 323 F.3d 160, 166 (1st Cir.

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dismiss, but solely because its fate hinged on the viability of the Plaintiffs' other federal claims. *See* Recommended Decision at 7-9 n.2, 21. Thus, to the extent original Count III(B) no longer is viable, original Count V fails.

[5] The Plaintiffs assert, *inter alia*, that the Town waived any objection to their challenge to the CEO Discretion Provision by failing to raise it in the context of the motion to dismiss. *See* Amendment Reply at 7. "The standing inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 68 (1st Cir. 2003) (citations and internal quotation marks omitted). To the extent that, as in this case, a standing challenge implicates Article III jurisdictional concerns, it is non-waivable. *See, e.g., New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 12 (1st Cir. 1996) ("Standing is a threshold question in every federal case, determining the power of the court to entertain the suit. After all, if a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case.") (citations and internal quotation marks omitted); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525 (7th Cir. 1990) (*continued on next page*)

2003). As the Town observes, *see* Amendment Objection at 3, the Revised Proposed Amended Complaint does not allege any injury traceable to the CEO Discretion Provision; to the contrary, it makes clear that the CEO did not deny the Permits in issue pursuant to that provision, *see* Revised Proposed Amended Complaint ¶¶ 24-25, 28.[6] The Plaintiffs rejoin that they nonetheless have standing to challenge that provision inasmuch as they seek declaratory and injunctive relief and challenge the 2003 Amendment overall, not just the denial of specific Permits to Kim York and Burning Rose. *See* Amendment Reply at 7. Further, they assert that "there is a near certainty that the 2003 Amendments will affect any applications [they] may file in the future." *Id*.

The fact that a plaintiff seeks declaratory and injunctive relief does not alter "the irreducible constitutional minimum of standing," which "includes suffering an 'injury in fact' that is 'actual or imminent.'" *Dudley v. Hannaford Bros. Co*., 333 F.3d 299, 306 (1st Cir. 2003) (citations and internal quotation marks omitted). A plaintiff requesting injunctive relief must "establish a real and immediate threat that illegal conduct will occur[.]" *Id*. (citation and internal quotation marks omitted); *see also, e.g., Weber v. Cranston Sch. Comm*., 212 F.3d 41, 47 n.7 (1st Cir. 2000) (observing that plaintiff easily met "the constitutional standing requirements of Article III: she alleges an actual injury, the injury can fairly be traced to the challenged conduct, and the injury can be redressed by the declaratory, injunctive, and monetary relief requested."); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (party seeking solely injunctive or declaratory relief only has standing to pursue claim if he or she can show, *inter alia*, invasion of legally protected concrete interest). The Plaintiffs seek only declaratory and injunctive relief. *See* Original Complaint at 7-8; Revised Proposed Amended Complaint at 8. However, for purposes of their claim

("There is a nonwaivable question of subject-matter jurisdiction: whether all the plaintiffs have standing under Article III
(*continued on next page*)

targeting the CEO Discretion Provision, they do not demonstrate harm fairly traceable to that provision or any real or immediate threat that a Permit denial pursuant to that provision will occur.

Nor, finally, does the mounting of a facial challenge to the 2003 Amendment excuse the lack of injury fairly traceable to the CEO Discretion Provision. My research discloses that an exception exists for facial challenges to laws implicating First Amendment rights. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) ("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad."); *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment.") (citations omitted); *United States v. Linick*, 195 F.3d 538, 541 (9th Cir. 1999) ("[A] party subject to a regulatory scheme may challenge the scheme on its face, without first applying for a permit, whenever the scheme allegedly vests authorities with substantial power to allow or deny expressive activity.").

Here, however, there is no allegation that the challenged provision implicates expressive activity. Therefore, the default standing rules pertain: To establish standing with respect to the challenged CEO Discretion Provision, the Plaintiffs must show either that they have been, or are in imminent danger of being, denied a Permit on the basis of that provision. *See, e.g., United States v. Single Family Residence &*

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of the Constitution to maintain this suit.").

Real Prop. Located at 900 Rio Vista Blvd., 803 F.2d 625, 630 (11th Cir. 1986) ("when First Amendment freedoms are not implicated, challenge must be examined in light of facts of case at hand"); *State v. Bachelder*, 565 A.2d 96, 97 (Me. 1989) ("Since this is not a first amendment challenge, Bachelder has no standing to argue that the statute may be unconstitutionally applied to others and is therefore overbroad."). Neither the Original Complaint nor the Revised Proposed Amended Complaint discloses that the Plaintiffs meet those elements with respect to the CEO Discretion Provision. Hence, they lack standing to challenge it.

In the absence of any federal foundational claim in either the original or proposed revised complaint, proposed Counts IV-VI are futile inasmuch as the court surely would decline to exercise its supplemental jurisdiction over them. The Proposed Revised Amended Complaint accordingly is futile in its entirety, on the basis of which I recommend that the Motion To Amend be denied. Further, inasmuch as (i) the Plaintiffs have clarified that the substantive claim that survived the Town's earlier motion to dismiss is solely a state-law claim, and (ii) I now determine that the Plaintiffs lack standing with respect to that surviving claim, I recommend that the court *sua sponte* dismiss that claim (original Count III(B)) as well as original Count V, which was solely derivative of it.

IV. Conclusion

For the foregoing reasons, I **GRANT** the Motion To Substitute and recommend that the Motion To Amend be **DENIED** and that the court *sua sponte* **DISMISS** the remaining counts of the Original Complaint (Count V and a portion of Count III(B)).

[6] The same is true of the Original Complaint. *See* Original Complaint ¶¶ 13, 17.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of January, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

Defendant

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